Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

INTERNATIONAL SHIPBREAKING LIMITED, L.L.C.,

Petitioner,

v.

L.C. SMITH; TUG ELSBETH II, her engines, tackle, etc., in rem, and SMITH MARITIME,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's holding in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and the general maritime law, may a tug boat company validly contract against all liability for its own negligence in performing a towing contract that results in damage or loss of the towed vessel?

PARTIES TO THE PROCEEDING

There are no parties to this matter that are not identified in the caption of the case. There are also no publicly traded parent corporations of any party that own 10% or more of the stock of any party to this matter.

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PETITION FOR WRIT OF CERTIORARI TO
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INTERNATIONAL SHIPBREAKING LIMITED, L.L.C., Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

This dispute arose from the intentional sinking of a vessel in the Pacific Ocean that was being towed by a tug boat company from Pearl Harbor to the Port of Brownsville, Texas, to be dismantled by a ship breaking company. There was a written towing contract between the ship breaking company and the tug company.

Following the sinking, the ship breaking company filed suit against the tug company for negligence, intentional conduct, and breach of its implied warranty of workmanlike service.

A counterclaim was filed by the tug company against the ship breaking company, alleging that the ship breaking company breached the towing contract by failing to make the final payment under the terms of the contract after the sinking and for providing an unseaworthy tow. The district court granted summary judgment in favor of the tug company and dismissed all the ship breaking company's claims.

A notice of appeal was filed. In its *per curiam*, unpublished opinion, the Fifth Circuit Court of Appeals held that the ship breaking company had no recourse against the tug company for sinking the tow and that it was required to pay the total contract amount to the tug boat company despite the unnecessary and intentional sinking.[1] The court of appeals denied the ship breaking company's petition for rehearing *en banc*.

JURISDICTION

Subject matter jurisdiction for the action filed in the United States District Court for the Southern District

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[1] While the court of appeals chose to not publish its opinion in this case, Rule 10 of the Supreme Court Rules does not suggest that whether a decision is published or not is a factor the Court considers in reviewing a petition for writ of certiorari. *See* SUPREME COURT RULE 10. Indeed, in this age of easy access to all court opinions and the modern trend in many states away from not allowing citations to unpublished opinions, it should especially not be a factor. *See, e.g.*, TEX. R. APP. P. 47.7 (as amended August 2002). Lastly, if it were a factor, then lower courts could easily usurp this Court's holdings by simply designating their opinions as unpublished. Clearly, such a practice would not promote sound public policy and access to this Court.

of Texas is provided by 28 U.S.C. § 1333(1). The district court's summary judgment in this matter was entered on September 21, 2001.

Subject matter jurisdiction for the appeal of the district court's decision to the Fifth Circuit Court of Appeals is provided by 28 U.S.C. § 1292(a)(3). The court of appeals' opinion in this matter was entered on June 11, 2002. The court's order denying the petition for rehearing *en banc* was entered on July 22, 2002.

Subject matter jurisdiction for review of this petition for writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 28 U.S.C. 1254(1), 28 U.S.C. 1292(a)(3), and 28 U.S.C. 1333(1) which are set forth verbatim in the appendix.

STATEMENT OF THE CASE

Factual Background

1. ISL's Contract with the United States Navy

International Shipbreaking Limited, L.L.C. ("ISL") is a ship breaking company located at the Port of Brownsville, Brownsville, Texas. It is actively engaged in the business of dismantling ships. ISL has dismantled no fewer than ten decommissioned Naval ships.[2]

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[2] *E.g.*, Ex-USS Yukon, Ex-USS Marias, Ex-USS Iwo Jima, Ex-USS Ajax, Ex-USS Josephus Daniels, Ex-USS General Simon B. Buckner, Ex-USS General Maurice Rose, Ex-USS Champion, Ex-USS MormacGlen, and Ex-USS Northwind.

The United States Navy negotiated a contract with ISL for the dismantling of two of its decommissioned destroyers–the Ex-USS COCHRANE and Ex-USS BENJAMIN STODDERT. The total contract price was approximately $2.6 million. Generally, the contract required ISL to provide all personnel, equipment, tools, vehicles, materials, facilities, supervision and any other items necessary to dismantle and dispose of the ships. More specifically, the contract required ISL to, among other things, purchase liability insurance on the vessels, tow the vessels from a Navy port to the Port of Brownsville, dismantle them, demilitarize certain equipment and property, completely scrap the hulls, dispose of hazardous waste and material, and sell the scrap material.

2. ISL's Contract with Smith Maritime

To perform its contract with the Navy, it was necessary for ISL to enter into a towing contract with a tug company. Thus, a towing contract was subsequently entered into between ISL and Smith Maritime, the tug boat company in this case. The contract required Smith Maritime to tow the two decommissioned Naval destroyers from Pearl Harbor to ISL's shipbreaking facility at the Port of Brownsville. The total price of the contract was $648,000. It was agreed by the parties that such sum would be paid by ISL to Smith Maritime in five installments based on various stages of performance of the contract.

3. The Voyage: A Tale of an Unnecessary Sinking & Cover-Up

Smith Maritime departed Pearl Harbor with the two former Naval destroyers in tow by only a *single* tug boat. The Ex-USS BENJAMIN STODDERT was staunch and seaworthy.

Paul Torres was one of six crew members aboard the tug. Approximately two weeks into the voyage across the Pacific Ocean, Torres observed the tug suddenly go from full power to almost a dead stop. Based on his tug experience, Torres knew that such a drastic reduction in speed was dangerous with a tandem tow because the vessels under tow could easily collide. Later, Torres observed the tug engines were powering up but the tug was not increasing speed. This led Torres into the belief that the tow was becoming heavier. The next morning, while checking the tows, Torres' belief was confirmed when he observed the Ex-USS BENJAMIN STODDERT listing about 10 to 15 degrees to starboard with its bow elevated.

After reporting his observations to the captain of the tug, the captain indicated that when the tug suddenly slowed the previous day, the continued momentum of the destroyers resulted in a collision between the bow of the Ex-USS COCHRANE and the stern of the Ex-USS BENJAMIN STODDERT. After the collision, the Ex-USS BENJAMIN STODDERT began taking on water in its aft compartment.

However, the former military vessel was highly compartmentalized and was never in danger of sinking. The captain of the tug nevertheless ordered the crew to cut the tow wire and became increasingly concerned about the tug's fuel level. It appears that the captain concluded that it would be much easier and much more economical to continue the voyage with only one tow rather than two, particularly in light of the fact that one of the tows became heavier after taking on some water.

Ultimately, Torres and another crew member were ordered by the captain to board the Ex-USS BENJAMIN STODDERT and open all its hatches so that it could begin taking on enough water to sink. After boarding the vessel, Torres observed that it was

completely dry all the way down to the lowest deck, and that deck was dry except for only the aft compartment. After opening all hatches, it took an additional 24 or more hours for the Ex-USS BENJAMIN STODDERT to sink to the bottom of the Pacific Ocean.

Following the sinking, Smith Maritime instructed Torres and the crew that if they wanted to keep their jobs, they would report to anyone who asked that the Ex-USS BENJAMIN STODDERT began taking on water from rotted outfall pipes around the hull and that the vessel could not be salvaged despite their best efforts.[3]

Proceedings Below

ISL filed suit against Smith Maritime, alleging negligence, intentional conduct, and breach of the implied warranty of workmanlike service. Smith Maritime filed a counterclaim against ISL to recover the final payment under the towing contract and for providing an unseaworthy tow. The district court granted summary judgment in favor of Smith Maritime on all ISL's claims and on Smith Maritime's claim to recover the final payment under the towing contract.

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[3] Interestingly, the court of appeals determined that Torres' affidavit attached to ISL's response to the motion for summary judgment to support its claim and controvert Smith Maritime's claim was based on speculation and hearsay. This finding, however, contravenes the Federal Rules of Evidence and Federal Rules of Civil Procedure, relative to summary judgments. Torres testified in his detailed affidavit, among other things, that the tug captain's actions and inactions caused the two vessels to collide on numerous occasions, that he was personally ordered by the captain to board the vessel and open all its hatches so that it could sink, and that he was personally ordered to fabricate a story about the sinking and loss of the tow. This testimony is based upon Torres' personal observations and is neither hearsay nor speculation. *See* FED. R. EVID. 602; FED. R. CIV. P. 56(e). Nothing would prevent Torres from presenting his testimony at trial.

Specifically, the district court found that ISL's original complaint and proposed amended complaint failed to sufficiently allege a claim that Smith Maritime intentionally sank the Ex-USS BENJAMIN STODDERT. Summary judgment was also granted against ISL on its negligence claim against Smith Maritime because the district court concluded that ISL did not possess a proprietary interest in the Ex-USS BENJAMIN STODDERT sufficient to allow ISL to maintain a negligence claim for economic damages, notwithstanding the undisputed facts that, *inter alia*, ISL had actual possession and control of the vessel, purchased liability insurance on the vessel, and was solely responsible for managing and maintaining the vessel. Summary judgment was also granted against ISL on its claim that Smith Maritime breached its implied warranty of workmanlike service. The district court relied on an exculpatory clause contained in the towing contract that purported to relieve Smith Maritime of all liability for its own negligence resulting in the loss of the towed vessel.

Summary judgment was also granted in favor of Smith Maritime on its counterclaim. The district court concluded that ISL's failure to make the final installment under the towing contract was a breach by ISL because the contract required full payment whether the tow was "lost or not lost."

The court of appeals affirmed the district court's ruling in all respects and essentially adopted the district court's findings and conclusions verbatim.

While ISL is firmly convinced that the district court's summary judgment and the court of appeals' opinion affirming same are erroneous in many respects, the precise question before this Court in this petition is whether the contractual provision in the maritime towing contract purporting to relieve Smith Maritime

from all liability for its own negligence in losing the tow is valid in light of this Court's holding in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

REASONS FOR GRANTING THE WRIT

The holding by the Fifth Circuit Court of Appeals that a tug company may validly contract against all liability for its own negligence in performing a towing contract and losing a tow is squarely in conflict and contrary to the holdings of this Court and other circuits, violates the general maritime law, and violates public policy.

The part of the court of appeals' opinion in this case that upholds an exculpatory clause in a maritime towing contract that purports to insulate the tower from all liability for its own negligence is squarely in conflict with well-settled and relevant authority from this Court and other circuits and, therefore, this petition for writ of certiorari meets the standard for granting a petition for writ of certiorari as provided by Rule 10(c) of the Rules of the Supreme Court of the United States.

Introduction

Admiralty jurisdiction is founded upon the broadest principles of equity and justice. *See The New England Marine Insurance Co. v. Dunham*, 78 U.S. 1, 23, 11 Wall. 1, 20 L.Ed. 90 (1871). These bedrock principles compel courts of admiralty to administer the broadest equity.

Under the general maritime law, an implied warranty of workmanlike service attaches to admiralty contracts. *See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 133-35, 76 S.Ct. 232, 100 L.Ed.

133 (1956). More specifically, towing agreements give rise to an implied warranty of workmanlike service which is breached by the negligence on the part of the owner of the tug. *See United States v. Tug Manzanillo*, 310 F.2d 220, 222 (9th Cir. 1962). The implied warranty of workmanlike service binds a tug owner to use the degree of diligence, attention and skill adequate to complete the task required by a towing agreement. *See La Esperanza v. Perez y Cia. De Puerto Rico*, 124 F.3d 10, 19 (1st Cir. 1997); *Coffman v. Hawkins & Hawkins Drilling Co., Inc.*, 594 F.2d 152, 154-55 (5th Cir. 1979).

Bisso *and its Progeny*

This Court held nearly 50 years ago in a seminal opinion authored by Mr. Justice Black, and affirmed in more recent opinions, that in a maritime towing agreement, the tug owner may not validly contract against all liability for its own negligence in performing a towing contract and thereby circumvent its implied warranty of workmanlike service. *See Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 90-91, 75 S.Ct. 629, 99 L.Ed. 911 (1955); *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 7, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co.*, 372 U.S. 697, 698, 83 S.Ct. 967, 10 L.Ed.2d 78 (1963); *Southwestern Sugar & Molasses Co. v. River Terminal Corp.*, 360 U.S. 411, 415-17, 79 S.Ct. 1210, 3 L.Ed.2d 1334 (1959). To date, this Court has not wavered from this rule of law, which is firmly rooted by significant public policy considerations. *See Bisso*, 349 U.S. at 90-91.

Further, following *Bisso*, including as recently as10 months ago, no other circuit court of appeals in the United States has ever enforced an exculpatory clause in a maritime towing contract that purported to relieve the tower from all liability for its negligence in performing a towing contract. *See Diesel "Repower,"*

Inc. v. Islander Investments Ltd., 271 F.3d 1318, 1324-25 (11th Cir. 2001) (recognizing that exculpatory clauses in maritime contracts releasing all liability invalid and against public policy); *Royal Ins. Co. of America v. Southwest Marine*, 194 F.3d 1009, 1014 (9th Cir. 1999) (exculpatory clauses in maritime towing contracts releasing all liability invalid and against public policy); *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 915 (3rd Cir. 1988) (exculpatory clauses in towing contracts releasing all liability invalid against public policy); *Canarctic Shipping Co. v. Great Lakes Towing Co.*, 670 F.2d 61, 63 (6th Cir. 1982) (exculpatory clauses in towing contracts releasing all liability invalid and against public policy); *Dow Chemical Co. v. M/V Charles F. Detmar, Jr.*, 545 F.2d 1091, 1094 (7th Cir. 1976) (exculpatory clauses in towing contracts releasing all liability invalid and against public policy and will not be enforced); *Kerr-McGee Corp. v. Law*, 479 F.2d 61, 64 (4th Cir. 1973) (recognizing that exculpatory clauses in towing contracts releasing all liability invalid and against public policy).

Indeed, prior to this case, not even the Fifth Circuit Court of Appeals has enforced such a contractual provision in a maritime towing contract. *See Dow Chemical Co. v. M/V Roberta Tabor*, 815 F.2d 1037, 1045 n.7 (5th Cir. 1987); *see also Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401, 409-11 (5th Cir. 1982); *Alcoa S.S. Co. v. Charles Ferran & Co.*, 383 F.2d 46, 55 (5th Cir. 1967). For example, in *M/V Roberta Tabor*, the court rejected an exculpatory clause that purported to relieve the tower from all liability for its negligence and affirmed the district court's ruling that the clause was invalid because it violated public policy under *Bisso*. *See* 815 F.2d at 1045 n.7. In the latter two cited cases, which are both maritime cases but do not involve towing contracts, the Fifth Circuit upheld exculpatory clauses where the clauses did not relieve

the ship repairer from all liability for its negligence but instead limited liability to $300,000. *See Todd Shipyards Corp.* 674 F.2d at 409-11; *Alcoa S.S. Co.*, 383 F.2d at 55.

The public policy considerations this Court found compelling and which led to the rule in *Bisso* are (1) deterring negligence by towers, and (2) the protection of those in need of maritime towage from being overreached by those who have the power to drive hard bargains. *See Bisso*, 349 U.S. at 91. This Court observed that the dangers of modern machines make it chiefly important to discourage negligence by maritime towers, and that increased maritime traffic make it important that vessels in port be able to obtain towage free of monopolistic compulsions. *See id.*

In explaining the policy considerations that invalidate such clauses in maritime towing contracts, Mr. Justice Douglas noted in *Bisso* that such clauses were especially invalid where, as in the instant case, "dead tows" were involved such that "the tug and the tug alone is in control" and "the tows are without power or crews." *See id.* at 96 (Douglas, J., concurring). Quoting from another maritime case, Mr. Justice Douglas also noted that "i[t] ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so, begets recklessness, carelessness and neglect." *See id.* at 97 (citation omitted). Lastly, the *Bisso* rule prohibiting such clauses in towing contracts is designed, in part, to prevent tugs who have absolute control of a tow from extorting an agreement that they may neglect all reasonable precautions to preserve the tow during voyage. *See id.* (citation omitted); *see also Boston Metals Co., The S/S Winding Gulf*, 349 U.S. 122, 123-29, 75 S.Ct. 649, 99 L.Ed. 933 (1955).

As noted, in the interest of maintaining certainty and uniformity in maritime law, no exceptions to the

rule in *Bisso* have ever been recognized. *See Dixilyn Drilling Corp.*, 372 U.S. at 698 (Harlan, J., concurring).

***Fifth Circuit Court of Appeals rejects* Bisso**

However, squarely in conflict with *Bisso* and its progeny, the Fifth Circuit has rejected *Bisso* and held in the present case that an exculpatory clause in a maritime towing contract that purports to relieve the tower from all liability for its own negligence is valid and not contrary to public policy.[4] (*See* Slip Opinion included in appendix).

The rationale for the court's holding is two-fold. First, the court of appeals held that the exculpatory clause was valid and not contrary to public policy because it contained a clause that deterred negligence. Specifically, the court found that the tower, Smith Maritime, retained "substantial exposure" as the result of an "identical provision" in the towing contract allocating risk of damage to the *tug* if the tow–*i.e.*, ISL–committed an act of negligence that caused damage to the *tug*. While the court cited a maritime case to support its holding, the case is inapposite because it did not involve a towing contract and the court's analysis is nevertheless fatally flawed. Second, the court of appeals held that the exculpatory clause is valid because there was no inequity in bargaining power in that both parties are "commercial entities" who were "free to

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[4] The provision provides:

> (b) The following shall be for the sole account of the Hirer without any recourse to the Tugowner, his servants or agents, whether or not the same is due to breach of contract, negligence or any fault on the part of the Tugowner, his servants or agents:
>
> > (i) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tow.

allocate risks between themselves and to disclaim implied warranties." The court of appeals did not rely on any maritime cases to support its holding. Rather, the court dismissed *Bisso* and chose instead to rely upon a state law case decided under the Uniform Commercial Code. *See* Slip Op., at 8 (citing *Employers Ins. of Wausau v. Suwannee River Spa Lines*, 866 F.2d 752, 764 (5th Cir. 1989)).

However, this case is governed by admiralty law, not state law. This Court has consistently held that state law may not be applied to a admiralty case where it deprives a party of any substantial admiralty rights as defined by the decisions of this Court or the Congress. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410, 74 S.Ct. 202, 204-05, 98 L.Ed. 143 (1953). Further, state law may not be applied to a case governed by admiralty law if its application would conflict with federal maritime law, as it would disrupt uniformity in admiralty law and would be redefining the requirements or limits of a remedy available at admiralty. *See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 337-40, 93 S.Ct. 1590, 1598-99, 36 L.Ed.2d 280 (1973). Accordingly, the court of appeals' application of a state law rule to this case, which is governed solely by admiralty law, is erroneous. Under the circumstances, the court of appeals deprived ISL of a substantial right and available remedy in admiralty–*i.e.*, the rule in *Bisso*. *See Hawn*, 346 U.S. at 410.

1. Public Policy: Deterring Negligence

Deterring negligence by tug operators is perhaps the most important public policy consideration that overrides the enforcement of exculpatory clauses in maritime towing contracts. In the instant case, the court of appeals failed to properly apply this policy consideration. Rather remarkably, in addressing *Bisso's*

public policy considerations, the court of appeals held that the exculpatory clause was valid and not contrary to public policy because the tower, Smith Maritime, retained "substantial exposure" as the result of an "identical provision" in the towing contract allocating risk of damage to the *tug* if ISL committed an act of negligence that caused damage to the *tug*. *See* Slip Op., at 8 (emphasis added).

The court of appeals held that because the *tow* would not be liable to the tug for the *tow's* negligence that damaged the tug, the tug was deterred from committing an act of negligence. *See* Slip Op., at 8. The court of appeals' holding is illogical and its analysis is fatally flawed. First, how a dead tow without power or a crew could commit an act of negligence that could cause damage to the tug is virtually unimaginable. Second, and more importantly, such a clause in the towing contract does not deter the *tug's negligence*. Whether the tow would be liable or not for negligently damaging the tug–if even possible–is wholly irrelevant to whether the contract contained a provision that created a deterrence to the *tug* committing an act of negligence that caused damage to or the loss of the tow. Quite simply, there is nothing in the towing contract that deterred the tug from committing an act negligence in this case. Indeed, the provision actually encourages negligence by the tug because there are simply no repercussions to the tug if it abandons all ordinary care and commits an act of negligence that damages or causes the loss of the tow.

2. Public Policy: Bargaining Power

In addition to deterring negligence, the other policy consideration that led to the rule in *Bisso* is the existence of an inequity in bargaining power in the maritime towage industry between tugs and vessels needing towage. Balancing the respective interests of

tugs and tows, this Court held that exculpatory clauses in towing contracts that insulate tugs from all liability for their own negligence are invalid because of the need to protect those in need of maritime towage from being overreached by those who have the power to drive hard bargains. *See Bisso*, 349 U.S. at 91. However, in the present case, the court of appeals rejected *Bisso* and chose instead to rely on a non-maritime, state law case to hold that exculpatory clauses in maritime towing contracts do not violate public policy where both parties are "commercial entities."

The case relied upon by the court of appeals to support its holding is factually inapposite to the present case because it involves the manufacture of an alleged defective product under state law and not a maritime towing contract. *See Suwannee River Spa Lines*, 866 F.2d at 764. As noted above, state law should not be applied to a case governed by the federal maritime law. *See Hawn*, 346 at 410; *see also Askew*, 411 U.S. at 337-40 (state law may not be applied to a case governed by admiralty law if its application would conflict with federal maritime law, as it would disrupt uniformity in admiralty law and would be redefining the requirements or limits of a remedy available at admiralty).

Further, the court of appeals neglected the fact that the respective parties in *Bisso* and in its progeny are *all* "commercial" entities. *See Bisso*, 349 U.S. 85; *see also Dixilyn Drilling Corp.*, 372 U.S. 697; *Diesel "Repower," Inc.*, 271 F.3d 1318; *Dow Chemical Co.*, 815 F.2d 1037. Accordingly, the court's holding that the exculpatory clause is valid merely because both parties in this case are "commercial entities" is supported by no maritime authority and is contrary to *Bisso* and its progeny.

Unfortunately, as when *Bisso* was decided, the realities of the maritime towage industry today dictate

that vessels in American ports remain able to obtain towage free of monopolistic compulsions. As the Court can well-imagine, a vessel in need of towage is often desperate. Further, vessels in American ports requiring towage rarely, if ever, have a choice in choosing a tug operator. Accordingly, because of the tow's desperation and the lack of a meaningful choice in choosing a tug, the operators of tugs today typically have superior bargaining power in negotiating–to the extent there is any–a maritime towing contract with a vessel in need of towage.[5]

Because the court of appeals rejected or ignored the rule of law in *Bisso*, followed by every other circuit in the United States, the court of appeals' holding is clearly erroneous.

3. Tug's Counter-Claim violates *Bisso* but affirmed by Fifth Circuit

On a related issue, the court of appeals affirmed the district court's summary judgment on Smith Maritime's counter-claim for breach of contract to recover the final payment under the towing contract. The court of appeals affirmed this ruling because it found that ISL's breach of contract claim could not be maintained because of the towing contract's exculpatory clause and because ISL was required to pay the full contract price no matter the circumstances that led to the loss of the tow.

The terms of the towing contract provided that ISL would pay Smith Maritime the total sum of $648,000 to tow the Ex-USS COCHRANE and the Ex-USS

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[5] This case was resolved in a summary judgment proceeding. There is consequently nothing in the record of this case to reveal the parties' relative bargaining power, the negotiation of the towing contract, if any, or any of the other circumstances that led to ISL choosing Smith Maritime to tow the vessel.

BENJAMIN STODDERT from Pearl Harbor to the Port of Brownsville. However, as alleged by ISL, due to Smith Maritime's conduct in unnecessarily and intentionally sinking the Ex-USS BENJAMIN STODDERT and thereby breaching its implied warranty of workmanlike service, ISL withheld the final installment under the towcon and instituted this litigation. Smith Maritime filed a counter-claim alleging that ISL breached the towcon by not paying the final installment. The district court granted summary judgment in favor of Smith Maritime, ruling as follows:

> Smith prays for summary judgment on its counterclaim for the unpaid installment of the contract. As Smith correctly points, out, [sic] the contract between Smith and ISL provides for payment for the two destroyers "lost or not lost." (citation omitted). Because the Court finds that the implied warranty of workmanlike service is superseded by the express contract provision, Smith's prayer for summary judgment is GRANTED. (citation omitted).

The court of appeals affirmed the district court's ruling.

The effect of the ruling is this: A tug owner is free to enter into a contract like the one in this case, pick up a tow from a distant port, voyage to the middle of the ocean, load the tow full with dynamite, ignite the fuses, blow up the tow, sink it and return to port (without the tow) and collect, *as a matter of law*, on the towing contract. This is, of course, absurd.

The contract language relied upon by the lower courts should not be construed nearly as broadly as suggested. While not conceding it, arguably, Smith Maritime could be insulated from some accidental loss

of a tow not caused by Smith Maritime's negligent or intentional conduct. In other words, for example, the contract may offer some protection to Smith Maritime if an act of God caused the loss of the tow or the act of some third party caused the loss of the tow–possibilities not relevant to the facts in this case.

There are several reasons why the lowers courts' rulings are erroneous, including because of the rule in *Bisso*. First, it is a fundamental principle of contract law that a material breach by one contracting party excuses performance by the other party. *See Hanson Prod. Co. v. Americas Ins. Co.*, 108 F.3d 627, 630-31 (5th Cir. 1997). Therefore, after Smith Maritime committed a material breach of the contract by intentionally sinking one of the vessels, ISL was legally excused from further performance under the contract, including paying the final installment for the delivery of a vessel that Smith Maritime intentionally sank and did not deliver. *See id.*

Second, as a general principle of law, a party may not shift liability for its future intentional acts, and exculpatory language may include some risks, "but it certainly does not include literally all risks." *See Amoco Prod. Co. v. Forest Oil Corp.*, 844 F.2d 251, 254 (5th Cir. 1988); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 333-34 (5th Cir. 1981). The provision requiring payment whether the tow is "lost or not lost" surely should not include intentional acts, fraud and every negligent act imaginable. *See id.* at 254-56 (a party should have sufficient notice of the kinds of risks its is bearing); *Corbitt*, 654 F.2d at 333-34 (contract language which purports to shift liabilities for negligence must be expressed in clear terms). There is simply no indication from reading the contract language what risks the provision "lost or not lost" was intended by the parties to include. *See Amoco Prod. Co.*, 844 F.2d at 254-55. However, only a tortured, perverse interpretation of the

provision "lost or not lost" would require ISL to pay Smith Maritime even if Smith Maritime committed a material breach of the contract and engaged in unnecessary and intentional conduct in causing the loss of the Ex-USS BENJAMIN STODDERT.

Third, the provision operates as an exculpatory clause and is therefore invalid as a matter of law under the rule in *Bisso* and its progeny. *See Bisso*, 349 U.S. at 90; *see also Dixilyn Drilling Corp.*, 372 U.S. at 968. The provision allows the tug to commit an act of negligence or other conduct in damaging or losing the tow, escape all liability for its own conduct, and still collect full payment under the contract from the tow. The rule in *Bisso* invalidates such contractual provisions because they violate public policy by not discouraging negligence. Indeed, the contractual provision at issue actually encourages negligence and abandonment of ordinary care because the tug will be paid the full contract amount whether it takes any precautions or incurs any expense to preserve the tow. In other words, why would a tug undertake to preserve a tow by expending time and labor to safeguard and deliver it to its destination, when it can merely cut the tow wire, sink the tow and return port to collect the full contract amount? The provision is invalid under *Bisso*.

CONCLUSION

ISL entered into a written towing contract with Smith Maritime. The contract required Smith Maritime to deliver two decommissioned Navy destroyers from Pearl Harbor to the Port of Brownsville. After Smith Maritime intentionally and unnecessarily sank one of the vessel en route, ISL filed suit for breach of contract–that is, breach of Smith Maritime's implied warranty of workmanlike service. The district court granted

summary judgment in favor of Smith Maritime on this claim because the towing contract contained an exculpatory clause that purports to insulate Smith Maritime from all liability for its own negligence in damaging or losing the tow. The court of appeals affirmed. The lower courts' holdings, respectively, are squarely in conflict with this Court's holding in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

In *Bisso* and in subsequent cases, this Court holds that a tug may not validly contract against all liability for its own negligence in performing a maritime towing contract. The *Bisso* rule is based upon well-grounded public policy considerations–deterring negligence by tug operators and protection of those in need of towage from monopolistic compulsions. These public policy considerations are no less compelling today. However, even if they are less compelling, this case was resolved by summary judgment and therefore the record is silent as to these factors.

Further, the lower courts failed to apply the *Bisso* rule in this case and chose, instead, to rely on state law cases to reach their respective conclusions. This Court has maintained in many cases over the years that state law may not be applied to a case governed by admiralty law, particularly where the application of state law disrupts uniformity in admiralty law or deprives a party of any substantial rights defined by the admiralty decisions of this Court or the Congress. The lower courts in this case deprived ISL of a cause of action based in admiralty and defined by this Court in *Bisso*.

Accordingly, this Court should GRANT this Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals and, after full briefing, reverse and remand.

RESPECTFULLY SUBMITTED,

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(Any footnotes trail the end of each document.)
01-41245

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INTERNATIONAL SHIPBREAKING
LIMITED L.L.C.,
Plaintiff,

v.

L.C. SMITH; TUG ELSBETH II,
her engines, tackle, etc. in rem,
Defendants,

and SMITH MARITIME,
Defendant-Counter Claimant

Filed June 11, 2002

Appeal from the United States District Court
For the Southern District of Texas
USDC No. B-01-CV-48

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.
PER CURIAM:*

International Shipbreaking Limited LLC ("ISL") appeals the district court's partial grant of summary judgment in favor of Smith Maritime ("Smith") dismissing all of ISL's claims and granting summary judgment to Smith on one of its counterclaims. ISL also appeals the district court's order denying its motion to amend its complaint. ISL has failed to show that triable issues of fact exist with respect to any of its claims or

that the district court erred as a matter of law by granting summary judgment in favor of Smith. ISL has also failed to show that the result in this case would have been different had it been permitted to amend its complaint prior to the district court's summary judgment ruling. We therefore affirm. The motions that have been carried with this case are both denied.fn1

This case arises out of the sinking of a naval destroyer during towage. The United States Navy entered a contract with ISL ("the Navy contract") for the dismantling of two of its decommissioned destroyers, the USS COCHRANE and the USS STODDERT. Pursuant to the Navy contract, ISL was responsible for dismantling the ships, disposing of hazardous waste, and selling scrap materials. As part of its contractual obligations, ISL was also responsible for towing both ships from Pearl Harbor, Hawaii to its facility in Brownsville, Texas and for purchasing insurance for the vessels.

Thereafter, ISL entered into a contract with Smith Maritime ("the Towcon") for towage of the destroyers from Pearl Harbor to Brownsville. Smith then dispatched its tug to Pearl Harbor to tow the destroyers in tandem to Brownsville. Approximately two weeks into the tow, a crewmember aboard the tug alerted the crew that the USS STODDERT appeared heavy with a starboard list. Later that morning, one-third of the USS STODDERT's main deck aft was reported to be awash and the bow was elevated. The tow wire was then cut.

For the next few hours, the tug stood by until the weather cleared enough for a salvage party to board the ship and assess the situation. Smith contacted the United States Coast Guard, the United States Navy, and ISL to discuss their options. Thereafter, Smith directed

the tug's captain to order all hatches opened to allow the USS STODDERT to sink. The USS COCHRANE was delivered to ISL in Brownsville.

ISL then filed suit against Smith for negligence in the towing of the destroyer and breach of the warranty of workmanlike service implied in the contract between ISL and Smith. In its answer, Smith counterclaimed that ISL breached its contract with Smith due to its failure to pay the final installment due to Smith under the contract and the unseaworthiness of the tow. Smith then filed a motion for summary judgment on ISL's claims and its counterclaims. After Smith filed its motion for summary judgment but before the district court ruled on the motion, ISL filed a motion to amend its complaint. The district court then granted in part Smith's motion for summary judgment. In a separate order, the district court denied ISL's motion to amend its complaint on the ground that it would not change the outcome of the summary judgment order. ISL appeals both rulings.

We review a district court's grant of summary judgment de novo. McClendon v. City of Columbia, 258 F.3d 432, 435 (5th Cir. 2001). We will affirm a district court's grant of summary judgment when, viewing the evidence in the light most favorable to the nonmoving party, the record reflects that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). We review a district court's denial of a motion for leave to amend its complaint for abuse of discretion. Gregory v. Mitchell, 634 F.2d. 199, 203 (5th Cir. 1981).

ISL first argues that the district court, when ruling on Smith's summary judgment motion, failed to address its intentional tort and fraud claims. This argument has

two subparts. First, ISL argues that it included sufficient allegations of intentional conduct in its original complaint to put Smith on notice of its intentional tort claim. Alternatively, ISL argues that, had the district court allowed ISL to amend its complaint, it would have clarified its intentional tort claim and added a new fraud claim.

After reviewing ISL's original complaint, we agree with the district court that ISL did not sufficiently plead an intentional tort claim. In its original complaint, ISL states that "Plaintiff's claim is for negligence and breach of warranty of workmanlike service." The only reference to intentional conduct was made in a separate paragraph of the complaint: "During the voyage, the USS STODDERT was lost and/or was intentionally scuttled in the Pacific Ocean due to the negligence and breach of warranty of workmanlike service provided by Smith, its tug, and its crew. Although the pleading requirements under Rule 8 of the Federal Rules of Civil Procedure do not require an inordinate amount of detail or precision, we believe this single reference to intentional conduct couched in negligence and breach of warranty claims was insufficient to put Smith on notice of an intentional tort claim. See St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425,434 (5th Cir. 2000) (stating that although a complaint does not need to include "magic words" to allege a claim, it must state factual allegations from which a claim conceivably could be made); FED. R. CIV. P.8 (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief").

We have also reviewed ISL's amended complaint to determine whether it would have changed the outcome on summary judgment. In its amended complaint, ISL adds more references to "intentional acts" and "fraud." ISL still fails, however, to allege sufficient intentional

conduct entitling it to relief.fn2 ISL also fails to make any attempt to plead its new fraud claim with particularity, as required by the Federal Rules of Civil Procedure. See FED. R. CIV. P.9 (requiring pleader to state the circumstances constituting fraud with particularity). Even assuming ISL's amended complaint satisfied the notice pleading requirements of Rules 8 and 9 of the Federal Rules of Civil Procedure, ISL failed to present sufficient summary judgment evidence to create a fact issue for the jury As a result, we conclude that the district court did not abuse its discretion when it denied ISL's motion to amend its complaint. See Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 667 (5th Cir. 1981) ("Clearly, if the complaint as amended would still be subject to dismissal, no abuse of discretion occurs when the amendment is denied").

Second, ISL argues that the district court erred when it dismissed its negligence claim against Smith based on the rule stated in Robins Dry Dock & Repair Co. v. Flint. In Robins Dry Dock, the Supreme Court held that, in maritime law, where a claimant sustains no physical damage to property in which it has a proprietary interest, no recovery is available for economic losses where a maritime tort is unintentional.fn4 ISL argues that the rule stated in Robins Dry Dock does not apply here because, by virtue of its contract with the Navy, it had a non-ownership proprietary interest in the USS STODDERT at the time the ship sank.

We have previously recognized a narrow exception to the rule stated in Robins Dry Dock for certain non-ownership proprietary interests. In Bosnor S.A. de C. V. v. Tug L.A. Barrios, we held that a bareboat charterer had a sufficient proprietary interest in the damaged property to state a cause of action for its economic

losses. 796 F.2d 776 (5th Cir. 1986). We reasoned that "[a] bareboat charterer stands in the shoes of the owner of the vessel for the duration of the charter and is responsible for managing and maintaining the ship." Id. at 783. If the vessel is damaged, the bareboat charterer is ordinarily responsible to the shipowner for the damage; in essence, the shipowner retains only a right of reversion. Id.; see Torch, Inc. v. Alesich, 148 F.3d 424, 427 (5th Cir. 1998) ("The essence of a bareboat charter is the complete surrender of possession and control by the vessel owner to the charterer."). ISL argues that, under its contract with the Navy, its responsibility for the USS STODDERT was analogous to that of a bareboat charter and thus the exception to Robins Dry Dock applies.fn5

After reviewing the evidence in the summary judgment record, we find ISL's obligations under the Navy contract insufficient to create a non-ownership proprietary interest in this case. Contrary to ISL' s assertions, the Navy did not surrender complete control of the vessel to ISL in the Navy contract, but specified the manner in which ISL was to perform its contractual duties. More importantly, the Navy retained substantial financial responsibility for the USS STODDERT. The Navy contract required that both the ISL and the Navy be named as co-insureds, stated that the cost of insurance was included in the contract payment to ISL, and provided that the Navy would indemnify ISL for losses not compensated for by insurance. Based on the Navy's continued responsibility for these liabilities, ISL cannot fairly be said to possess a proprietary interest in the USS STODDERT. Rather, ISL's interest in the USS STODDERT was limited to its economic expectation under its services contract with the Navy. As a result, the district court properly granted summary judgment in favor of Smith on ISL's negligence claim.

Third, ISL argues that the district court erred when it dismissed its claim for breach of the warranty of workmanlike service implied in the Towcon.fn6 According to the district court, the Towcon did not contain such an implied warranty because the parties explicitly provided for the allocation of risks between them.fn7 ISL suggests now that we should imply a warranty of workmanlike service because the risk allocation provision relied upon by the district court is against public policy and void. See Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) (holding that a party may not insulate himself from all liability caused by his own negligence).

After reviewing the Towcon and the relevant case law, we agree with the district court's conclusion that the Towcon does not include a warranty of workmanlike service. Specifically, we agree with the district court's reasoning that Smith and ISL, both commercial entities, were free to allocate contract risks between themselves and to disclaim implied warranties. See Employers Ins. of Wausau v. Suwannee River Spa Lines, 866 F.2d 752, 764 (5th Cir. 1989) (stating that, in a commercial context, parties are generally capable of allocating the risk of defective performance of a contract for services). Moreover, we note that the provision at issue here differs from the provision invalidated in Bisso because it does not shelter Smith froth all liability. Rather, Smith retained substantial exposure to liability vis-a-vis an identical provision allocating risk of damage to the tug to Smith "whether or not the same is due to breach of contract, negligence or any fault on the part of the Hirer [ISL]." We have previously upheld exculpatory provisions where a party has retained sufficient exposure to liability to deter negligence. See Todd Shipyards Corp. v. Turbine Serv. Inc., 674 F.2d 401, 410 (5th Cir. 1982) (upholding red

letter clause limiting defendant's liability for negligence and breach of contract to $300,000). Because the contract between ISL and Smith did not contain an implied warranty of workmanlike service, the district court properly granted summary judgment in favor of Smith on this claim.

Finally, ISL argues that the district court erred when it granted summary judgment in favor of Smith on its breach of contract counterclaim. Specifically, ISL argues that it was relieved of its obligation to pay the final installment under the contract because Smith breached the Towcon when it sank the USS STODDERT. We have already determined that ISL' s breach of contract claim fails because the contract between Smith and ISL did not contain an implied warranty of workmanlike service. Moreover, as the district court noted, the fact that the USS STODDERT sank before the completion of towage did not relieve ISL of its obligation to pay the final installment to Smith. The parties contemplated the risk of loss of the tow and expressly provided that payment was due "without any discount, deduction, set-off, lien, claim or counterclaim... fully and irrevocably earned at the moment it is due. . . Tug and/or Tow lost or not lost"fn8... Because ISL expressly bargained for the undertaking and not the result, it was obligated to make its final payment on the contract regardless of the sinking of the USS STODDERT. Thus, the district court properly granted summary judgment in favor of Smith on its counterclaim.

For the foregoing reasons, the district court's partial grant of summary judgment in favor of Smith is AFFIRMED. Smith's motion for partial dismissal and ISL's motion for attorneys' fees are DENIED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

fn1 While this appeal was pending, Smith filed a motion for partial dismissal, arguing that this court lacks jurisdiction to review the district court's denial of ISL's motion to amend its complaint because it is an interlocutory order. Because the district court's ruling on this motion may have affected its decision to grant summary judgment to Smith on ISL's claims, we have jurisdiction to review it. See Cal. Advocates for, Nursing Home Reform v. Creekside Care Convalescent, No. 97-15398, 1998 WL 75831, *3 (9th Cir.) (unpublished opinion) (citing Nat'l Am. Ins. Co. v. Certain Underwriters, 93 F.3d 529, 540 (9th Cir. 1996)). Thus, Smith's motion for partial dismissal is denied. ISL's request for attorneys' fees incurred as a result of responding to the motion to dismiss is also denied.

fn2 In its brief on appeal, ISL attempts to clarify its claim based on "intentional acts" as a claim for intentional interference with contractual relations. We find no reference to a claim for intentional interference with contractual relations in any of ISL's submissions to the district court, including ISL's response to Smith's summary judgment motion. Because ISL makes this argument for the first time on appeal, it is waived. Vogel v. Veneman, 276 F.3d 729, 733 (5th Cir. 2002).

fn3 The only evidence in the summary judgment record supporting ISL's sabotage theory is the affidavit of a crew member of the tug consisting largely of speculation and hearsay. See Fed. R. Civ. P. 56(c)

("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

fn4 Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) (holding that time charterer, who did not have a significant property interest in the ship at issue, could not maintain a negligence action against dry dock company for delaying in the performance of repairs to the ship and preventing the time charterer from operating the ship); see Reserve Mooring Inc. v. Am. Commercial Barge Line L.L. C., 251 F.3d 1069 (5th Cir. 2001) (holding that a mooring operator was precluded from recovering economic damages from a barge owner who, by sinking its barge, blocked vessels from mooring there, in the absence of physical damage to the mooring facility).

fn5 To support its contention that it had a proprietary interest in the USS STODDERT, ISL notes that it "gained possession and control" of the USS STODDERT from the Navy, that it was responsible under its contract with the Navy to procure and maintain insurance for the ship, that it was solely responsible for towing the ship from Pearl Harbor to Brownsville, and that it had control over the dismantling of the ship and the disposal of scrap material and hazardous waste.

fn6 Stevens v. East- West Towing Co., 649 F.2d 1104 (5th Cir. 1981) (recognizing an implied warranty of workmanlike service in a towing contract).

fn7 Specifically, the court noted that the parties, both commercial entities and sophisticated contractors,

contracted as follows:

> The following shall be for the sole account of the Hirer [ISL] without any recourse to the Tug Owner [Smith], his servants or agents, whether or not the same is due to breach of contract, negligence or any fault on the part of the Tugowner, his servants or agents:
>
> (1) loss or damage of whatsoever nature, howsoever caused to or sustained by the tow.

fn8 We also note that the USS COCHRANE was successfully towed by Smith to Brownsville, Texas.

C.A. NO. B-01-048 (admiralty)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
BROWNSVILLE DIVISION

INTERNATIONAL SHIPBREAKING
LIMITED L.L.C.,
Plaintiff,

v.

L.C. SMITH; TUG ELSBETH II,
her engines, tackle, etc. in rem,
Defendants,

and SMITH MARITIME,
Defendant-Counter Claimant

Filed September 21, 2001

ORDER

BE IT REMEMBERED, that on the 21st day of September. 2001 the Court considered the Defendant Smith Maritimes' Motion for Summary Judgment [Dkt. No. 01- CV-48]. Based on the pleadings, Motion, Amended Motion, Response, Reply to the Response, and the Response to the Reply to the Response, the Court GRANTED IN PART AND DENIED IN PART the Defendant's Motion for Summary Judgment.

1. Summary and Procedural History

These actions arise out of a series of events culminating in the sinking and loss from towage by Defendants of a naval destroyer, the USS STODDERT

("STODDERT"). On March 22, 2001, the hirer, International Shipbreaking, Limited, L.L.C. ("ISL") filed suit against Defendants "Smith L.C.," Smith Maritime, ("Smith") and the Tug ELSBETH II ('tug"). The complaint alleges a) negligence in the towing of the destroyer and b) breach of the warranty of workmanlike service implied under the contract between Smith and ISL ("Contract'). Smith timely filed an Answer in which it counterclaimed for breach of the contract due to a) ISL's failure to pay the final installment under the contract for the towage of the two ships, and b) the unseaworthiness of the tow.

ISL effected the arrest of the tug and demanded security for its in rem claims against it. Smith obtained and filed a bond for $1,000,000 for the release of the tug and filed a Claim of Owner for the Tug. Smith demanded and was granted, after a hearing before this Court, countersecurity from ISL In the amount of $400,000. See Motion Hearing. ISL posted countersecurity in the above amount The funds were deposited with the registry of the Court on July 9, 2001. See Docket Entry No. 32. On July 23, 2001, Smith filed a Motion for Summary Judgmentfn1 on ISL's claims of negligence and breach of the warranty of workmanlike service, as well as Smith's counterclaims for breach of the contract.

2. Standard for Ruling on a Summary Judgment Motion

Summary judgment is appropriate when, viewing the evidence and all justifiable inferences in the light most favorable to the nonmoving party, the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law." Fed. R. Civ. P. 56 (c). Hunt v. Cromartie, 526 u.s. 541 (1999). The party making a summary judgment motion has the initial burden of informing the court of the basis for the motion and identifying those portions of the pleadings and discovery documents which demonstrate the absence of a genuine issue of material fact. See Celotex v. Catrett, 477 U.S. 317 (1986); Colson v. Grohman 174 F.3d 498, 506(5th Cir. 1999). If the moving party meets this burden, the nonmovant must then designate specific facts showing there is a genuine issue for trial to survive summary judgment Anderson v. Liberty Lobby. Inc., 477 U.S. 242(1986); Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994).

3. Summary of Facts in the Summary Judgment Record

In November, 2000, Plaintiff International Shipbreaking, Limited, L.L.C. (ISL) was awarded a contract by the United States Navy to perform services relating to two decommissioned Navy destroyers, the COCHRANE and the STODDERT. The contract between ISL and the United States Navy ("Navy Contract") provided that ISL was to tow and dismantle the STODDERT and the COCHRANE, dispose of hazardous materials, sell scrap material, and for partnering. ISL was also to procure and maintain insurance on the vessels. ISL entered into a contract with Smith for the towage of the destroyers from Hawaii to the ISL facility in Brownsville. Smith in turn dispatched its tug to Pearl Harbor for this purpose. The tug left Pearl Harbor with the STODDERT and the COCHRANE in tow on January 17, 2001. All crew members rode on the tug, and none on either of the destroyers.

At 6:40 a.m. on February 2,2001, crew member Paul Torres alerted the crew that the STODDERT looked

heavy with a starboard list. By 9:00 a.m.. about one-third of the STODDERT's main deck aft was reported to be awash and the bow was rising out of the water. At about 10:00 a.m. the tow wire was cut.

For the next several hours, the tug stood by until sea conditions abated enough for a salvage party to board. At about 2:00 p.m., crew members Paul Torres and Jim Morrison boarded the STODDERT. Captain Latham Smith, in a telephone conversation, ordered the tug's captain to order all hatches opened to allow the STODDERT to sink. Morrison and Torres opened all exterior and some interior hatches. The STODDERT dropped below the water's surface at 12:40 p.m. the following day, February 3. The COCHRANE was delivered to ISL in Brownsville.

4. ISL's Negligence Claim: Application at Robins Dry Dock

As a general principal in maritime law, where a claimant sustains no physical damage to property of its own, no recovery is available for economic losses where a maritime tort is unintentional. See Robins Dry Dock & Repair Co. v. Flint., 275 U.S. 303 (1927). In Robins, a dry dock company contracted with the owners of a steamship to dock and perform repairs on a ship once every six months, during which time anyone wishing to hire the ship would not have access to it. When the dry dock company delayed repairs to the ship, a time chartererfn2 asserted a claim of negligence, maintaining that the dry dock company's delay kept the charterer from operating the ship for a period of two weeks. The Court held that the time charterer did not have a significant property interest in the ship which would allow it to state a claim for negligence, since "the contract [between the dry dock company and] the

owners imposed no immediate obligation upon the [the dry dock company] to third persons... and whether [the dry dock company] performed [the repairs] promptly or with negligent delay was the business of the owners and of nobody else. " Robins, 275 U.S. at 308.

The Fifth Circuit has further expanded on the principle that a claimant may not recover absent physical damage to some property in which it has a proprietary interest. Most recently, in Reserve Mooring Inc. v. American Commercial Barge Line L.L.C., 251 F.3d 1069(5th Cir. 2001), a mooring operator was precluded from recovering from a barge owner which sank its barge near the mooring facility, causing no damage to the facility but blocking other vessels from mooring there, which in turn caused economic damage to the mooring facility. Similarly, in State of La. ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) held that plaintiffs who suffered economic damage as a result of a chemical spill caused by the collision of a bulk carrier and a container ship could not recover since they sustained no physical damage to their property.

ISL maintains in its Response to Defendants' (sic) Motion for Summary Judgment (see fn. 1, supra) that the rule of Robins Dry Dock does not apply to this case for three reasons: 1) ISL has alleged an intentional tort or fraud;fn3 2) ISL has a proprietary interest in the STODDERT; and 3) that Robins applies only where no contractual relationship exists between the parties. The Court disagrees.

a. ISL's Complaint Does Not Allege Intentional Tort or Fraud

The complaint states that "[t]he Plaintiffs claim is for negligence and breach of the warranty of

workmanlike service implied by law in a towing contract with Smith L.C. & Smith Maritime.... During the voyage, the USS STODDERT was lost and/or intentionally scuttled in the Pacific Ocean due to the negligence and breach of warranty of workmanlike service provided by the Defendants, her tug and crew. Further and in the alternative, defendants were negligent and breached the warranty of workmanlike service in abandoning an endangered tow (USS STODDERT) without using all reasonable efforts to salvage her." See Complaint at 1-2. Federal Rule of Civil Procedure 8(e)(1) states that "[e]ach averment of a pleading shall be simple, concise and direct." A widely regarded authority comments: "This portion of [Fed. R. Civ. P.] 8 indicates the objective of the rule is to avoid technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved...." 5 Wright & Miller, Federal Practice and Procedure § 1215 at 137-38 (2d ed. 1990). "Notice pleading means, first of all, that plaintiff must give fair notice of what his claim is. The pleading must apprise the defendant of the precise nature of the claim, and the allegations of the complaint must be sufficiently clear and detailed to at least set forth the essentials." Higganbotham v. Mobil Oil Corp., 302 F. Supp. 857,861 (E.D. La. 1969); rev'd on other grounds. 436 F.2d 8 (5th Cir. 1970) (citations omitted) (emphasis added). Considering the above, the Court cannot read this portion of the Complaint as apprising Smith of any tort claim other than negligence.

b. ISL Had No Ownership Interest In the STODDERT

A proprietary interest is "[t]he interest held by a property owner together with all appurtenant rights,

such a stockholder's right to vote the shares." See Black's Law Dictionary at 616 (7th ed. 1999). The STODDERT was at all times the property of the United States Navy, and was not at anytime the property of ISL. Moreover, ISL's Co-Chief Operating Officer, Robert Berry, testified that he was aware that ISL never owned the STODDERT. See Transcript of Hearing of May 14, 2001 at 24. ISL's contract with the Navy was for certain services: towing, dismantling, and selling scrap. The Navy's contract with ISL directed the actions ISL was to take regarding the sale of the scrap, including reporting the results in a Cost Data Report. See Navy Contract Section C1-5. There is no evidence in the Summary Judgment record that ISL assumed any express ownership interest in the STODDERT under its services contract with the Navy.

The question then becomes whether some other type of non-ownership proprietary interest applies. ISL likens its interest to that of the bareboat chartererfn4 in Bosnor S.A. de C.V. v. Tug L.A. Barrios. 796 F.2d 776 (5th Cir. 1986). In that case, Reyna, a freight forwarder, contracted with Delmar for a bareboat sub-charter of a bargefn5 and a time sub-charter of a tug. When cargo was lost off the barge, the court held Reyna to have a sufficient proprietary interest in the barge to state a cause of action for Reyna's economic loss against Walton, the stevedoring company which loaded the cargo onto the barge, even though Reyna did not own the barge or cargo. The Court, noting the Robins court's suggestion that a bareboat charterer has a proprietary interest in the vessel chartered,fn6 created a narrow exception to the normal rule; "[a] bareboat charterer stands in the shoes of the owner of the vessel for the duration of the charter and is responsible for managing and maintaining the ship: the shipowner merely retains a right of reversion. Additionally, if the vessel is damaged,

the charterer is ordinarily responsible to the shipowner for the damage." Id. at 783 citing Gilmore & Black, The Law of Admiralty §§ 4-20-4-24 (2d ed. 1975).

ISL argues essentially that its contractual relationship with the Navy is analogous to that of the bareboat charterer. ISL asserts that it has a direct relationship to the STODDERT, because ISL is not a "stranger to the contract like the claimants in Reserve and Testbank. See Response to Defendants' (sic) Motion for Summary Judgment at 10 fn. 1, supra). The question becomes whether the relationship between ISL and the STODDERT is more analogous to that of the bareboat charterer or that of the time charterer to their respective vessels. The Court finds that ISL's relationship with the STODDERT is closer to that of the time charterer.

The bareboat charterer fits into the narrow category of nonowners with a proprietary interest because it assumes the role of temporary owner of the vessel, and is as ultimately responsible for the vessel for the duration of the voyage, just as the actual owner would be. In contrast, the time charterer at no time manages the vessel, controlling only the destination and designating what type of cargo, if any, will be carried. The ship's owner is responsible for all other matters relating to the time charter voyage.

Under its contract with the Navy, ISL was to provide the personnel (see Navy Contract at 3), insurance (see Navy contract at 15), and other materials. However, the terms of the Navy contract provided that the government would indemnify ISL "against liabilities (including expenses incidental thereto) to third persons which. . . would have been covered by . . . Collision Liability and Protection and Indemnity Liabilities Insurance,fn7 and which are not compensated by

insurance or otherwise, provided such liabilities are represented by final judgment or by settlements approved in writing by the Department." (See Navy Contract at 15). Because the Navy assumed financial responsibility for these liabilities, ISL cannot be said to have assumed the role of temporary owner of the STODDERT for the duration of the voyage, and therefore had insufficient proprietary interest in it to state a claim for economic loss. Therefore, on the issue of negligence in the loss of the STODDART, summary judgment is GRANTED in favor of the Defendant.fn8

5. ISL's Breach of Warranty of Workmanlike Service Claim

As a matter of general maritime contract law, a warranty of workmanlike service is implied in maritime contracts. Stevens v. East-West Towing Co., Inc., 649 F.2d 1104(5th Cir. 1981); Cargill Inc. v C. & P. Towing Co., Inc., 1991 AMC 101 (E.D. Va. 1990).

The contract between Smith and ISL states:

> (B) The following shall be for the sole account of the Hirer [ISL] without any recourse to the Tug Owner (Smith], his servants or agents, whether or not the same is due to breach of contract, negligence or any fault on the part of the Tugowner, his servants or agents;
>
> (i) loss or damage of whatsoever nature, howsoever caused to or sustained by the tow

See Contract Id. Part II 18(2)(b).

ISL asserts that "Smith is liable for the loss of the STODDERT because Smith breached a warranty of workmanlike service which is implied despite this explicit contract provision." The Court will here decide whether the above-cited contract clause is valid.fn9

The Court finds the Fifth Circuit's decision in Employers Ins. Of Wausau v. Suwannee River Spa Lines Inc., 866 F.2d 752 (5th Cir. 1989) persuasive. In Suwannee, the owner of a vessel brought a products liability claim against the builder and construction supervisor of the vessel for economic losses sustained when the vessel sank. Because no warranties are implied in contracts for services (as they would be under the U.C.C.), the court considered whether a warranty is implied in a commercial services contract. The court held that a clause in the construction contract limiting the owners recovery to the cost of repair or replacement of guarantee deficiencies was valid even though the vessel sank, making repair or replacement of such deficiencies impossible. The court reasoned that the risk of damage was understood by the (sophisticated) commercial parties who had allocated the risk to the owner; therefore no tort-like implied extracontractual warranties were necessary. The court stated:

> In a commercial context. parties are generally capable of allocating the risk of defective performance of a contract for services in the same way that they can allocate the risk of a defect in the product itself. While the commercial purchaser of services will not have the benefit of implied warranties imposed by the U.C.C., it may bargain- as mentioned above— for an express warranty of workmanlike

> performance or for an express warranty defined in terms of the quality of the finished product. The contract price would then turn in part on whether the provider of services is willing to guarantee that its performance of the contract will be satisfactory.
>
> Employers Ins. of Wausau v. Suwannee River Spa Lines. Inc., 866 F.2d 752, 764-65 (5th Cir. 1989) (some citations omitted).

In reaching this conclusion, the Suwannee court discussed PPG Industries Inc. v. Sunstrand Corp., 681 F. Supp. 287 (W.D. Penn. 1988), a non-maritime case involving a dispute over an engineering agreement. The PPG court reasoned that "the special non-contractual duties of professionals such as doctors, lawyers, and architects enforced by tort law were created in part to make up for the lack of sophistication and bargaining power of those seeking these professional services." Id. at 290. The Suwannee court also examined the Supreme Court's East River case, which noted that in a commercial context, disparities in the bargaining power of the parties which would justify the imposition of such extracontractual duties rarely exist. See East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858,872-73 (1986). The Suwannee court concluded that this is equally true "where the parties to a contract for services are sophisticated commercial entities, 'adept at negotiating complex agreements and allocating risks between them." Suwannee, 866 F.2d at 765, quoting PPG, 681 F. Supp. at 290. Similarly, in the contract between Smith and ISL, where both parties are clearly commercial entities, no implied warranty of workmanlike service will control the contract where express provisions explicitly provide for the allocation

of risk. Therefore, finding as the Court does that the warranty of workmanlike service implied in maritime contracts does not control a contract between commercial entities which expressly provides that the risk be otherwise allocated, Summary Judgment for the Defendant on ISL's breach of warranty claim is GRANTED.

6. Smith's Breach of Contract Claim

Smith prays for summary judgment on its counterclaim for the unpaid installment of the contract.fn10 As Smith correctly points, out, the contract between Smith and ISL provides for payment for the two destroyers "lost or not lost". See Contract Part II Clause 2(c). Because the Court finds that the implied warranty of workmanlike service is superseded by the express contract provision, Smith's prayer for summary judgment is GRANTED. See Wausau, 866 F.2d at 764-65 (5th Cir. 1989).

Smith's counterclaim states that ISL also breached the Contract by providing an unseaworthy tow.fn11 ISL has created an issue of fact through the affidavit of its Co-Chief Financial Officer CEO Robert Berry, who stated that contrary to the affidavit of Latham Smith, he never ordered the scuttling of the STODDERT.fn12 ISL has therefore created an issue of material fact with regard to whether the tow was seaworthy which Smith has not rebutted, as is its burden. Celotex, 477 U.S. at 323. The Court finds that because material issues of fact remain regarding whether the COCHRANE was unseaworthy summary judgment on that issue is inappropriate and is therefore DENIED.

DONE at Brownsville, Texas, this 21st day of September 2001.

Hilda G. Tagle
United States District Judge

Footnotes

fn1 The Court notes that the Motion for Summary Judgment is advanced by Defendant Smith Maritime only, and not by Defendant Smith L.C., In Personam, or Defendant the Tug ELSBETH II, her engines, tackle and gear, etc, In Rem. These Defendants have, to date, filed no answers. Smith's Motion was superseded by an Amended Motion for Summary Judgment filed August 17, 2001.

fn2 A charter for the specified period, rather than for a specific task or voyage; a charter under which the shipowner continues to manage and control the vessel, but the charterer designates the ports of call and the cargo carried. Each party bears the expenses related to its functions and for any damage it causes. — Also termed catch-time charter. Black's Law Dictionary, at 229 (7th ed. 1999).

fn3 The Court notes that Fed. R. Civ. P. 9(b) requires that fraud be pleaded with particularity. Although ISL's Response to Defendants' (sic) Motion for Summary Judgment (see fn. 1, supra) states that "fraud and an intentional tort by the Defendants have been alleged [in the Original Complaint]," the Complaint does not meet the heightened pleading requirement. ISL has submitted an Opposed Motion for Leave to Amend ISL's Original Complaint in order to allege a claim of fraud. This motion is treated in a separate order.

fn4 Black's Law Dictionary defines a bareboat charter as: A charter under which the shipowner provides the ship, and the charterer provides the

personnel, insurance, and other materials necessary to operate it. —Also termed demise charter. Id., at 228(7th ed.1999).

fn5 Delmar bareboat chartered the barge from its owners, Cheramie Bo-Truc #7, Inc., and time chartered the tug from its owners, Slatco. Delmar then subchartered both to Reyna.

fn6 The Bosnor Court acknowledged an exception suggested by Robins for bareboat or demise charterers: "The district court allowed recovery on the ground that the respondents had a 'property right' in the vessel, although it is not argued that there was a demise." Bosnor, at 783 citing Robins, at 309 (emphasis added). The Bosnor court read this language as an indication of the Robins courts belief that a demise charter would have a stronger case for asserting a property right.

fn7 "Traditionally, hull marine insurance policies covered collision liability and damage to the ship and machinery on board, but not liability for damage to its cargo. This deficit in marine insurance was filled by the creation of mutual protection and indemnity clubs [or policies], which insured liability for personal injury and cargo loss aboard the vessels." Travelers Indeminity Co. v. Calvert Fire Ins. Co., 798 F.2d 826 (5th Cir. 1986).

fn8 On these grounds, we also dispose of ISL's claim that the contract with Smith was enough to give it a proprietary interest in the STODDERT Plaintiff's Response to Defendants' (sic) Motion for Final Summary Judgment at 9 (see fn.1, supra). ISL argues that, like Reyna, it was a party to a contract and therefore has a proprietary interest in the lost item. The Court disagrees. IS L's contract with Smith does not in any way create an interest which would allow ISL to

claim that the STODDERT was somehow effectively its property. ISL's contract with the Navy was a service contract regarding property it did not own and was not ultimately responsible for. If any contract were to create such an interest, it would be the contract between ISL and the Navy, which, as discussed above, did not do so.

fn9 ISL, in its Response to Smith's Reply to ISL's Response to Smith's Motion for Final Summary Judgment, cites Bisso v. Inland Waterways Corp., 349 U.S. 85(1955) as standing for the proposition that "exculpatory provisions in towing contracts are invalid as a matter of the general Maritime law." See ISL Response at 7. However, it is important to note that Bisso deals with a provision purporting to insulate the defendant from negligence. Because ISL does not state a cognizable claim of negligence, the fact that such a contractual provision would be unenforceable in a cause of action for negligence is irrelevant where ISL is suing for breach of a warranty implied in the contract. It is possible that the express provision has validly insulated Smith from the implied warranty of workmanlike service as a matter of maritime contract law. This is the question the Court examines in the section above.

fn10 A hearing for the purpose of determining damages will be set at a later date, as the amount appears from the record to be in dispute. Transcript of Hearing of May 14, 2001, Testimony of Robert Berry at 36-37.

fn11 The Court notes that although the seaworthiness of a tow is also generally implied in maritime contracts, see King Fisher v. NP Sunbonnet, 724 F.2d 1161 (5th Cir. 1984), the parties here took the time to insert an express contract provision requiring that the tow be seaworthy. See Contract at Part II (12).

fn12 Fed. R. Civ. P. 56(e) states, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Paul Torres' affidavit does not affirmatively set forth that he is competent to testify to the proper procedure of a tug and tow operation. Moreover, he does not purport to have personal knowledge of the events leading up to the alleged collision between the two tows. Therefore, Torres' affidavit will not be considered by the Court.

No. 01-41245

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INTERNATIONAL SHIPBREAKING
LIMITED L.L.C.,
Plaintiff,

v.

L.C. SMITH; TUG ELSBETH II,
her engines, tackle, etc. in rem,
Defendants,

and SMITH MARITIME,
Defendant-Counter Claimant

Filed July 22, 2002

Appeal from the United States District Court
for the Southern District of Texas,
Brownsville

ON PETITION FOR REHEARING EN BANC

(Opinion 06/11/02, 5 Cir.,__, __F.3d__)

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER. CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having

requested that the court be polled on Rehearing En Banc (FED. R.APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT.

United States Circuit Judge

Section 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Section 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

* * *

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

Section 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.